Indiana Department of Education

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QUARTERLY REPORT

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The Quarterly Report provides information on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at kmcdowel@doe.state.in.us.

In this report:

RELIGION AND CURRICULUM: THE STUDY OF ISLAM

The U.S. Supreme Court has not banned instruction concerning religion in public schools. In School District of Abington Township v. Schempp, 374 U.S. 203, 225, 83 S. Ct. 1560 (1963), the highest court noted that "it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization."

This is often stated in more simplified terms: Public schools can teach *about* religion rather than *teach* religion. Crossing the line can result in litigation claiming the challenged practice violates the First Amendment's religion clauses.[1] However the concept may be phrased, the social sensitivities of the times may result in litigation to prevent or challenge the teaching about certain faith traditions**.** The tragic events of September 11, 2001, and subsequent hostilities have made the teaching about Islam a sensitive matter. Not surprising, there has been litigation.

Middle School World History Module

In Eklund, *et al.* v. Byron Union School District, *et al*., 2003 U.S. Dist. LEXIS 27152 (N. D. Cal. 2003), plaintiffs challenged the middle school curriculum that involved the use of a role-playing game to teach seventh grade students about Islam. Plaintiffs claimed the school's methods violated the Establishment Clause of the First Amendment.

The California State Board of Education requires seventh grade world history classes to include a unit on Islamic history, culture, and religion. There is an approved textbook–*Across the Centuries*–which the school district employs, but the teachers are encouraged to use other instructional methods they believe will enhance their students' understanding of the unit.

Some teachers used an interactive module called "Islam: A Simulation of Islamic History and Culture," which uses a variety of role-playing activities to engage students in situations approximating the Five Pillars of Islam, the elements of faith in the Muslim religion.[2] Id. at 1-4.

Students were encouraged but not required to choose a Muslim name to facilitate the role-playing. For the first two Pillars of Islam, the teacher read Muslim prayers and portions of the Qur'an aloud in class. Student groups recited a line from a Muslim prayer, such as "In the name of God, Most Gracious, Most Merciful" as they left class. Students also made group posters. Some banners had quotations from the Qur'an, both in Arabic and English, although this was not required. Id. at 6-7.

For the third and fourth Pillars, students were encouraged to give up things for a day, such as watching television or eating candy, to demonstrate the fasting associated with *Ramadan*.

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[1]"Congress shall make no law respecting an establishment of religion, or the free exercise thereof ..."

[2]The Five Pillars of Islam are *Shahada* (profession of faith in God); *Salaat* (prayer five times a day); *Ramadan* (ritual fasting from dawn to dusk during the month of Ramadan); *Zakaat* (charity); and *Hajj* (pilgrimage to Mecca).

Students were also encouraged to perform volunteer community service, mostly around the school, as a means of demonstrating the charity aspect of *Zakaat*. In all, these four activities took about a week in the eight-week unit. Id. at 7-8.[3]

For the fifth Pillar–*Hajj*, the pilgrimage to Mecca–the teacher had the students participate in a board game called "Race to Makkah." Students used their knowledge of Islam to advance on the board, with the goal of the game to reach "Mecca." Cards were used that expressed certain elements of the Muslim faith, with three categories to choose from ("trivia," "truth," or "fact"). The teacher indicated the statements were expressions of what Muslims believed and were not actual historical fact. The teacher also permitted students to dress in Arabic garb for class presentations. Id. at 8-9.

As a part of the final, the teacher required the students to write an essay critiquing elements of Islamic culture, albeit with the following caveat: "BE CAREFUL HERE–if you do not have something positive to say, don't say anything!!!" The final followed the events of September 11, 2001, and the teacher was concerned the students might "express racist remarks" rather than attend to the objectives of the unit on Islam. Id at 10.

Other world history units also used role-playing. Some units also addressed religious themes, such as the rise of Christianity after the fall of the Roman Empire and the role of Buddhism in Chinese culture. Id. at 10-12.

Although Plaintiffs' son had participated in the Islam module when he was in seventh grade, his sister was allowed to "opt out" of the unit when the parents requested this. The Plaintiffs' daughter was provided an alternate assignment (the French Revolution) while the rest of the class participated in the Islam unit. Id. at 12-13.

The school moved for summary judgment. The federal district court judge noted that the Supreme Court has fashioned three separate but interrelated tests for analyzing Establishment Clause disputes: the Lemon test,[4] the Lynch endorsement test,[5] and the Lee test.[6] Id. at 14-16.

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[3]During the time of the events at issue, the tragic events of September 11, 2001, occurred. The class spent a week discussing the attacks in the context of world history. Id. at 5.

[4]Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105 (1971). The government action at issue must (1) have a secular purpose; (2) not have the principal or primary effect of advancing or inhibiting religion; and (3) not foster excessive government entanglement with religion.

[5]Lynch v. Donnelly, 465 U.S. 668, 688, 104 S. Ct. 1355 (1984) (Sandra Day O'Connor, J., concurring), which is somewhat a clarification or refinement of the "excessive entanglement" prong of Lemon. Under the endorsement test, the question is whether the challenged practice "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

[6]Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649 (1992). This test is also known as the "coercion test." "[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support

The court also noted that "[a]s an initial matter, the Supreme Court has held that the public schools bear the responsibility of educating their students about the history and cultures of other countries, which often must include a discussion of religion as well." Id. at 19. "The history of man is inseparable from the history of religion." Id at 19-20, quoting Engel v. Vitale, 370 U.S. 421, 434, 82 S. Ct. 1261 (1962).

The "Coercion Test"

The Plaintiffs argued the role-playing games constituted the practice of Islam, and the school district's use of the Islam simulation module constituted an impermissible endorsement of the Islam faith. Id. at 21.

Under the Lee or "Coercion Test," the Establishment Clause is violated where a school coerces students into participating in religious activities. "Coercion" can include "subtle and indirect pressure," such as social pressure from peers to conform to school-set norms, even if students are otherwise free to opt-out of the unit. Id., citing to Lee, 505 U.S. at 592-94. The school district argued that, as a threshold matter, the Establishment Clause could not be violated because the role-playing activities at issue were not "religious" activities. Id.

The court found that an objective review of the circumstances led to the conclusion the students at the middle school "Cannot be considered to have performed any actual religious activities in their seventh grade world history class." The students did not perform the actual Five Pillars of Faith. They did not proclaim faith in one God or belief in Muhammad as His prophet, did not pray five times a day, did not fast for a month, did not make charitable donations, and did not travel to Mecca. "Instead, the students participated in activities which, while analogous to those pillars of faith, were not actually the Islamic religious rites." Id. at 22-23. "Role-playing activities which are not in actuality the practice of a religion do not violate the *Establishment Clause*." Id. at 24. "In addition, there is no evidence that the students performed these classroom activities with any devotional or religious intent." Id. at 25. "The students' subjective lack of spiritual intent further demonstrates that the activities in question cannot objectively be considered 'religious activity' for the purposes of Lee." Id. at 26.

The "Endorsement Test"

The Plaintiffs countered that should the court find the role-playing activities did not constitute a "religious activity," the module nonetheless had the effect of advancing or endorsing the Islam religion, failing both the Lemon and the Lynch tests. Id. at 27.

The court agreed that the Islam module would be unconstitutional under both Lemon and Lynch should the role-playing activities have the primary effect of either endorsing or disapproving of any religion. Id.

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or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so." 505 U.S. at 587.

> Under an objective review of the situation at hand, the students would not reasonably have understood the module to have endorsed Islam over other religions merely because of the role-playing activities at issue. As a matter of law, "a practice's mere consistency with or coincidental resemblance to a religious practice does not have the primary effect of endorsing religion." Brown v. Woodland Joint Unified School District, 27 F.3d 1373, 1381 (9th Cir. 1994) (role-playing witchcraft rituals not an endorsement of Wiccan religion). Thus, the mere fact that the Islam role-playing module involved approximations of Islamic religious acts is not sufficient to create an endorsement of the Islamic faith.

Id. at 29. A reasonable student could not have believed the activities constituted an endorsement of religion. Students at the middle school participate in a number of role-playing activities for purely educational reasons, and were exposed to a number of different religions. "Given these facts, an objective review of the activities in question does not result in a finding of an endorsement of Islam." Id. at 29-30. In addition, the use of the Islam module was motivated by a purely secular purpose: to instruct the students in world history regarding the history, culture, and religion of Islam. "[E]ven quasi-religious role-playing is permissible if it does not objectively endorse one religion over another." Id. at 31.

The judge was likewise not swayed by the Plaintiffs' claim the banners violated the Establishment Clause, drawing an analogy to the display of the Ten Commandments. The court added that the display of the banners was not for the primary purpose of endorsing a religion, as the display of the Ten Commandments was in Stone v. Graham, 449 U.S. 39, 41, 1001 S. Ct. 192 (1980). Id. at 32. The court was likewise not persuaded by Plaintiffs' objections to the "Race to Makkah" trivia game and its cards that quizzed students on information they had learned during the Islam module. Given the context in which the cards were used, an objective observer could not conclude the cards endorsed Islam. Id. at 33-36. In addition, the teacher's cautionary note prior to the final examination could not reasonably be construed as endorsement of Islam. Id. at 36-37. The school district was granted summary judgment. Id. at 42.

Plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit. In a terse opinion, the 9th Circuit summarily affirmed the decision of the federal district court judge. See Eklund, *et al.* v. Byron Union School District, *et al.*, 154 Fed. Appx. 648 (9th Cir. 2005). On May 31, 2006, the Plaintiffs filed for a writ of certiorari with the U.S. Supreme Court (No. 05-1539). The Supreme Court denied the writ on October 2, 2006. Eklund v. Byron Union School District, 127 S. Ct. 86 (2006).

A Post-Secondary Dispute

Eklund involved middle school students, where the Lee "coercion test" would be applicable. This test has not been applied in a post-secondary context, but that does not mean the study of Islam does not have its constitutional challenges.

In Yacovelli, *et al.* v. Moeser, *et al.*, 324 F.Supp.2d 324 (M.D. N.C. 2004), the University of North Carolina at Chapel Hill (UNC) instituted as a part of its freshman orientation program the study of a book about the Qur'an. The goals of the orientation program are, in part, to stimulate discussion and critical thinking around a current topic, along with the typical goals to introduce

students to academic life at UNC, provide a common experience for incoming students, and enhance a sense of community among students, faculty, and staff. For the 2002 orientation, UNC selected portions of Michael Sells' *Approaching the Qur'an: The Early Revelations*, "stating that a book exploring Islam was highly relevant in light of the terrorist attacks of September 11, 2001." Id. at 761. In the portions of the book assigned to be read, the author attempts "to clarify the cultural and historical matrix in which the Qur'an came to exist, the central themes and qualities of hymnic Suras,[7] and the manner in which the Qur'an is experienced and taken to heart within Islamic societies." Id. at 762.

Initially, UNC required all incoming freshmen to read the book and write a paper in response to the book, guided by a series of questions previously prepared. Id. Later, UNC indicated that students with religious objections did not have to read the book and, instead, could write a paper addressing why they chose not to read the book. The papers were collected but not graded. Id.

Plaintiffs challenged the orientation program, arguing it violated the Free Exercise Clause of the First Amendment by assigning a book with a positive portrayal of both Muhammad and Islam and by forcing students to read and discuss the book.[8] The Plaintiffs also asserted that UNC's forcing students to write about and share their personal religious beliefs subjected them to harassment and ridicule. Id. at 762-63.

The district court observed that "the free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." Id. at 763, quoting from Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 877, 110 S. Ct. 1595 (1990). Government–including UNC–may not "compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma." Id., quoting Employment Division. However, where the challenged government action is "a neutral, generally applicable law, the government need not establish a compelling governmental interest even though the action may have the incidental effect of burdening one's religious beliefs. Id.

The Plaintiffs in this case have not alleged sufficient facts to state a claim for violation of the Free Exercise Clause. The court previously found the assigned book was not religious reading but part of an academic exercise.[9] Notwithstanding, UNC allowed any who objected to reading the book to "opt out" of the reading assignment. The only factual allegations remaining involve whether the requirement that students who "opted out" write about why they chose not to read

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[7]"Suras" are described as "hymnic chapters." The "rhythmic patterns of the Arabic language" are "central to the Qur'an." 324 F.Supp.2d at 762, *n*. 3, *n* 4.

[8]The Plaintiffs earlier sought a preliminary injunction to prevent the orientation program, but the district court and the U.S. Court of Appeals for the Fourth Circuit denied the injunctive relief.

[9]Yacovelli v. Moeser, 2004 WL 1144183 (M.D. N.C. 2004).

the book and attend a two-hour discussion group lead by a facilitator interfered with such students' exercise of their religious beliefs. Id.

The Plaintiffs' remaining claim must fail, the court determined, because the UNC orientation program did not compel the affirmation of any particular religious belief, did not lend its power to a particular side in a controversy over religious beliefs, did not impose special disabilities on the basis of religious views or religious status, or did not punish the expression of any particular religious doctrines. Id. at 763-64.

> ...UNC, instead of endorsing a particular religious viewpoint, merely undertook to engage students in a scholarly debate about a religious topic. The discussion groups that followed the reading assignment were likewise intended to encourage scholarly debate abut the Islamic religious. Students were free to share their opinions on the topic whether their opinions be positive, negative or neutral.

Id. at 764. Students were not punished for their expressions on the basis of religious belief or doctrine. "To the contrary, UNC permitted an exception for students who objected to reading the book on religious grounds." Although a writing sample was still required of students who "opted out," these students could explain their reasons for not reading the book and do so "in any manner they chose, including by expressing their own religious views." The assignment "specifically encouraged students to address any and all views they may have had on either the Qur'an or on the Islamic faith." Id.

No particular group was penalized. All freshmen students were required to attend a group discussion on topics relating to the Islamic religion and traditions, where they were encouraged to contribute to an academic discussion on a controversial topic. No one's religious beliefs were burdened by this academic exercise. Id.

> Part of the purpose of this program was to introduce students to the type of higher-level thinking that is required in a university setting. Students who were not members of the Islamic faith, probably the great majority of students, were neither asked nor forced to give up their own beliefs or to compromise their own beliefs in order to discuss the patterns, language, history, and cultural significance of the Qur'an.

Id. The school's Motion to Dismiss was granted.

SEPARATE BUT COMPARABLE: SINGLE-SEX CLASSES AND PUBLIC SCHOOLS

Since its enactment in 1972, Title IX has ensured that no person in the United States, on the basis of that person's sex, would be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial

assistance. 20 U.S.C. § 1681(a). This would apply to all public schools because all public schools receive federal financial assistance.

Title IX does not mandate that all educational programs or activities be co-educational, such as the Girl Scouts, the Boy Scouts, the Camp Fire Girls, YMCA, YWCA, "and voluntary youth service organizations which are so exempt [from taxation], the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age." § 1681(a)(6)(B).[10]

The regulations at 34 C.F.R. Part 106 expand upon Title IX but militate against separate classes except under certain conditions.[11] Generally, separate courses are prohibited. Under 34 C.F.R. § 106.34:

> A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

No Child Left Behind Act

On January 8, 2002, President George W. Bush signed into law the No Child Left Behind Act (NCLBA). Under Subchapter V ("Promoting Informed Parental Choice and Innovative Programs"), funds made available to local public school districts are to be used for innovative assistance programs, which may include "[p]rograms to provide same-gender schools and classrooms (consistent with applicable law)." 20 U.S.C. § 7215(a)(23).[12]

Shortly thereafter, the Office for Civil Rights (OCR) of the U.S. Department of Education–the entity responsible for the enforcement of Title IX requirements in educational institutions receiving federal financial assistance–issued "Guidelines on Current Title IX Requirements related to Single-Sex Classes and Schools."[13] The May 3, 2002, document noted the general prohibition against single-sex classes or schools under Title IX, but also detailed the exceptions, including separation of the sexes in physical education classes for certain activities or purposes,

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[10]There are also exemptions for Boy or Girl conferences, such as Boys State and Girls State, § 1681(a)(7), as well as father-son, mother-daughter activities so long as comparable activities are provided for students of both sexes. § 1681(a)(8).

[11]Two notable exceptions include discussions on human sexuality, 34 C.F.R. § 106.34(e), and choruses, § 106.34(f).

[12]This provision appeared originally as Sec. 5131(a)(23) in the NCLBA.

[13]This document is available at OCR's web site: http://www.ed.gov/policy/rights/guid/ocr/edlite-t9-guidelines-ss.html

such as those activities that involve bodily contact. § 106.34(c). "In addition separation of students by sex is permitted if it constitutes remedial or affirmative action. 34 CFR 106.3."

OCR also indicated that Title IX exempts from its coverage "the admissions practices of non-vocational elementary and secondary schools."

> Accordingly, the regulations do not prohibit recipients from adopting single-sex admissions policies in non-vocational elementary and secondary schools. *See* 34 CFR 106.15(d). However, the regulations specifically provide that an LEA [Local Educational Agency] may exclude any person from admission to a non-vocational elementary or secondary school on the basis of sex only if such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools. 34 CFR 106.35(b). In other words, under the current regulations, an LEA cannot use a single-sex admissions policy–which is not itself subject to Title IX's prohibition–as the predicate for otherwise causing students, on the basis of sex, to be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. For example, school districts may not establish a single-sex school for one sex that provides the district's only performing arts curriculum. Students of the other sex also must have access to a comparable school with that curriculum. It has been our long-standing interpretation, policy, and practice to require that the comparable school must also be single-sex.[14]

OCR also indicated that although it was precluded from "examining an LEA's justification for a single-sex school, LEAs also should be aware of constitutional requirements in this area. LEAs may be challenged in court litigation on constitutional grounds."[15]

The 2006 Regulations

OCR published in 2002 a Notice of Intent to Regulate in the *Federal Register*. Two years later, proposed regulations were published. The final rules were published on October 25, 2006.[16] According to U.S. Secretary of Education Margaret Spellings, the new regulations will permit single-sex classes but these "must be substantially related to the achievement of students,

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[14]OCR's Memorandum was published in the *Federal Register*, Vol. 67, No. 89 (May 8, 2002).

[15]OCR was referring to two post-secondary cases decided by the U.S. Supreme Court: U.S. v. Virginia, *et al.*, 518 U.S. 515, 116 S. Ct. 2264 (1996) (state-sponsored, male-only military college violated Equal Protection Clause of the Fourteenth Amendment); and Mississippi University for Women, *et al.* v. Hogan, 458 U.S. 718, 102 S. Ct. 718 (1982) (state-sponsored, female-only nursing school violated the Equal Protection Clause).

[16]*Federal Register*, Vol. 71, No. 208, beginning at p. 62530. The rules became effective on November 24, 2006.

providing diverse educational opportunities or meeting the particular, identified needs of students. If a single-sex class is provided, the important objective must be implemented in a manner that treats male and female students even-handedly."[17] Secretary Spellings added that "[i]n some cases, a substantially equal single-sex class in the same subject may be required in addition to the required coeducational class. The new regulations also require that school districts and private schools conduct evaluations of their single-sex classes at least every two years to ensure their compliance with regulatory requirements."

The new regulations[18] address not only single-sex classes and schools but extracurricular activities as well. Under § 106.34(b), as revised, a public school could provide single-sex classes or extracurricular activities if there is established an "important objective" for doing so, such as to "improve educational achievement of its students." The single-sex nature of the class or extracurricular activity must be "substantially related to achieving that objective." § 106.34(b)(1) (i)(A). Such separate classes or activities could also be established "[t]o meet the particular, identified needs" of students. § 106.34(b)(1)(i)(B). The "important objective" must be implemented in "an evenhanded manner." § 106.34(b)(1)(ii). Enrollment must be "completely voluntary." § 106.34(b)(1)(iii). All other students, including those excluded because of gender, must receive "a substantially equal coeducational class or extracurricular activity in the same subject or activity." § 106.34(b)(1)(iv); (b)(2).

In determining whether a public school has established a "substantially equal" coeducational class or extracurricular activity, OCR will consider, *inter alia*, "the policies and criteria of admission; the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books; instructional materials and technology; the qualifications of faculty and staff; geographic accessibility; the quality, accessibility, and availability of facilities and resources provided to the class; and intangible features, such as the reputation of faculty." § 106.34(b)(3).

A public school must evaluate its single-sex program or activity at least every two years to ensure the program or activity is "based upon genuine justifications" and not upon "overly broad generalizations about the different talents, capacities, or preferences of either sex and that any single-sex classes or extracurricular activities are substantially related to the achievement of the important objective for the classes or extracurricular activities." § 106.34(b)(4).

The revised regulations also permit single-sex schools. See § 106.34(c). Where a single-sex school is provided, students excluded from the single-sex school are entitled to a "substantially equal single-sex school or coeducational school." § 106.34(c)(1). However, a single-sex charter school operating under State law does not have to offer a "substantially equal" alternative to those students excluded based on their gender. § 106.34(c)(2). OCR will employ the same factors when analyzing whether the alternative opportunities were "substantially equal." § 106.34(c)(3).

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[17]*Press Release* of October 24, 2006. See http://www.ed.gov/news/pressreleases/2006/10/10242006.html.

[18]The regulations can be found at http://www.ed.gov/legislation/FedRegister/finrule/2006-4/102506a.html

Comments and Criticisms

The new regulations are "likely to accelerate efforts by public school systems to experiment with single-sex education, particularly among charter schools. Across the nation, the number of public schools exclusively for boys or girls has risen from 3 in 1995 to 241 today, said Leonard Sax, executive director of the National Association for Single Sex Public Education. That is a tiny fraction of the approximately 93,000 public schools across the country."[19]

Although there are critics of the new regulations–along with vague threats of legal action–"some studies suggest low-income children in urban schools learn better when separated from the opposite sex. Concern about boys' performance in secondary education has also driven some of the interest in same-sex education."[20]

The inspiration for the current regulations apparently arises from the success of the Young Women's Leadership School, which was founded in 1996 by Ann Rubenstein Tisch in East Harlem. She noted that single-sex schools existed for affluent girls and parochial students "but not for inner-city girls."[21] In the school's six graduating classes, there has been a 100 percent graduation rate, a 100 percent rate of enrollment in four-year college programs, and an 82 percent retention rate once the girls entered college.[22]

"Even in 2001 the Harlem program had already impressed [Sen.] Hilary Rodham Clinton [D-NY], who talked about the school on the floor of the Senate. 'We could use more schools such as this,' Clinton declared, joining Sen. Kay Bailey Hutchison [R-Tex.] in proposing an amendment to the No Child Left Behind education reform act that would make this possible. That amendment is responsible for [the] changes."[23]

THE TEN COMMANDMENTS: THE SUPREME COURT'S SPLIT DECISIONS AS APPLIED

The U. S. Supreme Court's two decisions in 2005 regarding the display of the Ten Commandments, although criticized by some lower courts as failing to provide direction, remain the standards for analyzing such displays.[24] In Van Orden v. Perry, 545 U.S. 677, 125 S. Ct. 2854 (2005), the Supreme Court found that the display on the 22 acres of land surrounding the

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[19]"Federal Rules Back Single-Sex Public Education," *New York Times* (October 25, 2006).

[20]Id.

[21]"Are Single-Sex Classrooms Legal?", *U.S. News.com: Nation & World* (October 27, 2006).

[22]Id.

[23]Id.

[24]See "The Ten Commandments: The Supreme Court Hands Down a Split Decision," **Quarterly Report**, April-June: 2006. Also, please consult the Cumulative Index under "Ten Commandments" or "Decalogue" for additional articles on this topic.

Texas State Capitol of a monument depicting the Ten Commandments donated by the Fraternal Order of Eagles did not violate the Establishment Clause of the First Amendment. The monument was one of 38 monuments and historical markers on the grounds and had stood there without incident for over 40 years. Although the Ten Commandments is a religious text, the monument's purpose was not solely religious but involved civic or secular matters as well (reduction of juvenile delinquency). The monument served "a mixed but primarily nonreligious purpose." 125 S. Ct. at 2871 (Stephen G. Breyer, J., concurring). "[W]here the Establishment Clause is at issue, we must distinguish between real threat and mere shadow. Here, we have only the shadow." Id.

McCreary County, Kentucky, v. American Civil Liberties Union of Kentucky, 545 U.S. 844, 125 S. Ct. 2722 (2005) is a different story. In this case, the original displays in the two county courthouses involved in this dispute were gold-framed copies of the King James' version of the Ten Commandments. The purpose was primarily religious. After a lawsuit was filed, the legislative bodies for the two counties passed virtually identical resolutions authorizing an expanded display that included eight other documents in smaller frames, each having a religious theme or excerpted to highlight religious content. The resolutions were unequivocally religious in tone although attempting to establish the Ten Commandments as the "precedent legal code upon which the civil and criminal codes of...Kentucky are founded." 125 S. Ct. at 2729-30. After the federal district court ordered the displays removed, the counties erected a third display with all nine framed documents of equal size. The counties did not withdraw or amend their original resolutions. The Supreme Court found the display failed to satisfy the three-part test developed under Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105 (1971).[25] Although the counties attempted to disguise the third display as one promoting civic understanding of the foundations of law, a reasonable observer would be mindful of the history surrounding the creation of the displays–including the wording of the resolutions that were never repealed and the ceremonies establishing the displays. The county legislative bodies' purpose behind all three displays was predominantly religious in nature, failing the first part of the Lemon test and thus violating the Establishment Clause.

Is it possible for one monument, over a period of time, to satisfy Van Orden but run afoul of McCreary County? It happened in Staley v. Harris County, Texas, 461 F.3d 504 (5th Cir. 2006).

Staley involved a monument that was originally erected in 1956 by the Star of Hope Mission, a local Christian charity, on the grounds of the Harris County Civil Courthouse. The monument was a memorial to William S. Mosher, a Houston businessman and philanthropist who had been an active supporter of the Star of Hope Mission's work among the indigent. He died in 1948. Star of Hope designed and paid for the monument. Engraved on the front of the monument is the following:

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[25]In order to pass constitutional muster, a challenged governmental action: (1) must have a secular purpose; (2) must have a primary effect that neither advances nor inhibits religion; and (3) must not foster an excessive entanglement with religion. Failure to satisfy any one of these three parts will render the challenged activity unconstitutional.

STAR OF HOPE
MISSION
ERECTED
IN LOVING MEMORY
OF
HUSBAND AND FATHER
WILLIAM S. MOSHER
A.D. 1956

The top part of the monument had a glass-topped display case with an open Bible, a testament to Mosher's faith. However, there is no explanation on the monument to this effect. The monument resembles a lectern. It was dedicated in 1956 in a public ceremony that included Christian prayers. The monument faces the front of the courthouse. 461 F.3d at 506.

Although the monument faced the front of the courthouse, one would have to walk up to the monument before one would observe the open Bible, which measures only twelve by sixteen inches. Star of Hope maintained the monument till 1995. During this time, the monument was vandalized several times and the Bible stolen. Star of Hope repaired the monument and replaced the Bible each time. When objections were raised regarding the presence of the Bible, Star of Hope removed the Bible in 1988. From 1988 to 1995, the top of the monument remained empty. It was often used as a trash bin. Id. at 506-07.

In 1995, John Devine–campaigning on a platform to put Christianity back in the courthouse–was elected district judge. Judge Devine and his court reporter began to solicit private contributions to refurbish the monument and restore the Bible to the display case. The judge also wanted to add neon lighting to the display case. By November of 1995, Judge Devine had accomplished his goal, including the addition of a red neon light that outlined the Bible. At the rededication ceremony, a number of Christian ministers led prayers. Id. at 507. Repairs were undertaken in 1996 and 1998. For awhile, the court reporter would turn the pages of the Bible to selected passages. Although Harris County did not pay for the improvements to the monument, it does pay the electric bill for the neon light. Since 1997, Star of Hope has resumed maintenance of the monument, including turning the pages of the Bible. Id.

Staley is an attorney. She passes the monument going to and from the courthouse in the course of her occupation. She found the Bible display offensive because it advances Christianity and it sends a message to her and other non-adherents of Christianity that they are not full members of the Houston political community. She filed suit in 2003 in the federal district court, seeking to have the Bible display removed. Staley's lawsuit resulted in a large rally in support of the "Bible Monument," with Judge Devine and others speaking in favor of the monument and joining in prayers led by Christian ministers. Id.

In 2004, the federal district court entered final judgment in favor of Staley, ordering Harris County to remove the Bible from the display case and pay Staley's attorney fees of $40,586. The district court found the purpose and effect of the Bible in the monument casing were religious and thus violated the Establishment Clause. Id. at 508.

Harris County appealed, arguing the district court erred by focusing on the Bible apart from the Mosher memorial; by finding the monument had a religious purpose when its purpose was a civic memorial to the honor the life of Mosher; and by finding the monument had a religious effect when the inscription was a nonreligious statement memorializing Mosher's life. A reasonable observer, Harris County asserted, would recognize that Star of Hope erected the monument as a private expression and that Harris County did not endorse the inclusion of the Bible. Id.

The United States Court of Appeals for the Fifth Circuit did not address either the first or third parts of Harris County's argument because it found the monument, as a whole, had a predominantly religious purpose, thus violating the Establishment Clause. Id. The 5th Circuit noted that the recent monument decisions by the Supreme Court–McCreary County and Van Orden–were not available to the district court when it decided the matter. Based on these decisions, "A monument attacked under the *Establishment Clause* will not pass constitutional scrutiny if the objective observer concludes that the purpose or the effect of the monument advances a religious message demonstrating sectarian preferences." Id. at 509, *n*. 6.

Utilizing McCreary County, the 5th Circuit noted the "reasonable observer" would possess a "reasonable memory" and would know the history and context of the government action that is being challenged. This would require one to look at the record of evidence demonstrating the progression leading to the challenged activity. Id. at 510. "Reading the majority opinion in its entirety and attempting to place its observations and holdings in context, we must conclude that it does not bring good news for the defendants in this case." Id. at 511.

Turning to Van Orden, the 5th Circuit employed the concurring opinion by Justice Breyer, which asserted one must examine the context of the display to determine the predominant message it conveyed. Several different factors come into play, such as the circumstances surrounding the display's placement on government grounds, the physical setting of the display, and the amount of time the display stood without challenge. Id. at 512. Justice Breyer distinguished Van Orden from McCreary County. In the former, the monument was donated for a civic purpose and stood for decades on government property without offending anyone. McCreary County, however, had a more recent history that demonstrated substantial religious objectives for the establishment of the display. He stated that "a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that this longstanding, pre-existing monument has not." Van Orden, 125 S. Ct. at 2871 (Breyer, J., concurring). The viewpoint that matters, then, is the one of a reasonable observer and "not of the uninformed, the casual passerby, the heckler, or the reaction of a single individual." Id. at 513, quoting Van Orden v. Perry, 351 F.3d 173, 177-78 (5th Cir. 2003), *affirmed* 545 U.S. 677, 125 S. Ct. 2854 (2005).

With respect to the Mosher monument, "[a]n original religious purpose may not be concealed by later acts, nor may a new-found religious purpose be shielded by reference to an original purpose." Id. at 513.

The purpose of the monument when it was first erected in 1956 was to honor the life and contributions of Mosher. The Bible was included to represent Mosher's faith tradition. The reasonable observer would understand the history and context of the 1956 monument, and would

know of Mosher's contributions and the importance of his faith in his life. Although some religious expression and values are involved in the creation of the monument, the primary purpose of the original monument was to honor the life and contributions of a generous, compassionate, and well respected member of the community. In addition, the monument stood for 32 years without a complaint. This indicates the original purpose "was not objectively seen as predominantly religious." Id.

The second phase of the monument began in 1988 when the Bible was removed from the monument. The monument was largely neglected for the next seven years. The third and final phase began in 1995 through the efforts of Judge Devine. "Now this is the point at which the monument begins to morph into a religious symbol, an occurrence that would have been fully noticed by the objective observer." Id. at 513-14.

In 1995, the Bible was replaced. "[T]he circumstances attending the replacement indicate an almost exclusively religious purpose for the restoration of the monument." Id. at 514. First, the refurbishment was instigated by Judge Devine's campaign promise to put Christianity back in government. Neither Judge Devine nor his court reporter knew Mosher or his family (or Star of Hope, for that matter). Any assertion that the refurbishing of the monument was to honor Mosher would be "factually baseless." Second, the refurbishment did not merely restore the monument to its former state. Significant alternations were made to the monument, especially the addition of a red neon light surrounding the Bible, highlighting and illuminating the religious portion of the monument where there had been no such previous emphasis or focus. Third, the dedication ceremony featured several Christian ministers who led the assembled in recitation of Christian prayers. Lastly, the "length of time between the refurbishment of the monument and the legal objection to it is relatively short...." Id.

> Based on these events, the reasonable observer would conclude that the monument, with the Bible outlined in red neon lighting, had evolved into a predominantly religious symbol. In examining the distinct third phase of the monument, the objective observer would note the primarily religious purpose attached to the monument. Taking into account Judge Devine's political platform, the lack of connections between the refurbishers of the monument and Mosher or Star of Hope, the religious ceremonies attending the refurbishment, and the addition of a red neon light drawing added attention to the religious portion of the monument, an objective observer would conclude that the monument in its new phase of life had come to have a predominantly religious purpose. This observer would conclude that Judge Devine and his allies essentially had commandeered the monument for religious purposes, and that the primary purpose of the monument had now become religious.

Id. at 514-15. Accordingly, the decision of the federal district court was affirmed. Id. at 515.

COURT JESTERS: SNICKER POODLE

Normally, a legal dispute over veterinarian bills for a poodle is not fodder for the whimsy of a state court judge. But that depends upon the state court judge.

In Zangrando v. Sipula, 756 A.2d 73 (Pa. Super. 2000), the judge was Mike Eakin, who later would take his famous attempts to versify his decisions to the Pennsylvania Supreme Court, where his poetic dissent in Porreco v. Porreco, 811 A.2d 566 (Pa. 2002) brought a strong rebuke from the Chief Justice and ignited a firestorm of discussions in legal circles both as to the appropriateness of such stylized decisions as well as the inequity of the majority opinion that now-Justice Eakin lampooned.[26]

In this case, Julia Zangrando was walking her two miniature poodles–Angel and Autumn–along the road when Jan Sipula, who was driving down the same road, hit Angel, causing injury to the dog that resulted in over $1,000 in veterinarian bills. Zangrando sued Sipula to recover the costs of the veterinarian services. The trial court found Sipula liable to Zangrando for the damages, and Sipula appealed, arguing, *inter alia*, that he should not be liable because Zangrando committed contributory negligence by standing in the roadway or that Angel rushed into the path of his automobile. Judge Eakin affirmed the trial court's decision, but not without 60 stanzas of (ahem) doggerel.

Judge Eakin set the scene: a wintry day; Mrs. Zangrando walking her two miniature poodles along the road; suddenly, Mr. Sipula's car appears.

> The poodles waited for the car, and
> watched as it drew near,
> thinking there was naught at all to cause
> them any fear,
>
> For often cars would pass them by, but
> this was no wayfarer–
> the car began to veer toward them and
> caution turned to terror.
>
> The car was coming much too close, some-
> thing inside told her;
> the next thing Mrs. Zangrando knew,
> a poodle flew over her shoulder
>
> To appellee [Zangrado] this was nothing short of an
> unmitigated disaster;
> the wingless Angel'd taken flight and ascended
> quickly past her**.**

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[26]See "The Case of the *Sham Rock*," **Quarterly Report** July-September: 2002. The case involved a 45-year-old divorced car dealer who wooed a 17-year-old part-time worker in a ski shop with what she thought was a $21,000 engagement ring but turned out–during later divorce proceedings–to be a virtually worthless cubic zirconium.

In this brace of miniature poodles, neither
one wide nor tall,
one may have been named Autumn, but
'twas Angel took the fall.

756 A.2d at 74-75. Angel would survive her injuries, but the veterinarian bill would be $1,155.00. Following Zangrando's successful suit to recover for damages, Sipula appealed the trial court's decision. He argued that Zangrando must have been standing in the roadway.

But appellee gave testimony she walked
upon the "berm,"
and while the Vehicle Code has not defined
that term

The cases hold a berm is not highway or
street *per se*;
it's a border visibly distinct from the
remainder of the way.

* * *

We find no negligence in staying off the
neighbor's grass;
the road was fifteen feet in width, with
room to safely pass.

Id. at 76. Sipula argued that perhaps Angel had caused the accident.

Appellant, however, argues that because
he hit the dog
while driving in the roadway, Angel must
be the road hog.

But he didn't testify he saw the dag dash
to the street,
yet he'd have this Court assume such
caused the dog and car to meet.

Even if the poodle strained to reach the
leashes' end,
appellant veered toward Angel, testimony
we may not amend.

Id. The facts established at trial indicate that Sipula did not see the dog in the street.

If one looks very closely, the sum of
appellant's dissembling
is he saw no impact 'til Angel rose, an
extra point resembling.[27]

[27]The court's decision was not rendered during football season.

The collision he says he didn't see, a fact
there's no denying,
so he can't tell if Angel moved before he
sent her flying.

Id. The court was also dismissive of Sipula's argument that there was a "sudden emergency" that would negate any negligence on his part (and relieve him of paying the vet's bill).

This doctrine's application is with
unforeseen events
when normal care's impossible in
any real sense.

Unexpected perils do from time to
time arise
whose suddenness may obviate the fault
in our law's eyes.

But while appellant touts this rule, no
matter how it's styled
he needs to have us find the dog was like
the darting child,

And there simply is no evidence that Angel
did such darting
before the car ran into her, trajectory
imparting.

*** * ***

This claim of exigency he makes further
begins to unravel
when one but thinks about appellant's
stated rate of travel.

15 miles an hour he claims as his
maximum rate of speed,
quite a cautious, prudent rate, not
very fast indeed,

Not fast enough to trouble him or force
a quick decision;
it shows, had he been paying heed, there'd
have been no collision;

For he admits he saw the dogs as he
approached the scene,
and didn't know he'd struck a pup 'til
Mrs. Zangrando keened.

It's also hard to quarrel here with what
the trial court said:
That speed's not fast enough to launch
a poodle overhead.

Id. at 77. The court applauded Sipula's efforts and arguments, but ultimately decided they lacked merit.

Be it interstate or neighborhood, drivers
get no free shot
at things they may encounter, whether
in the street or not.

So while counsel raises issues that are
worthy and well taken
in the end we find the effort to apply them
here's mistaken.

We must conclude the issues raised do not
warrant a new trial
and all that we may offer now is this
respectful rhymed denial.

Id. at 78. Sipula's counsel was *not* heard to mumble "dog gone" when he read the court's decision, but it would have been appropriate under the circumstances.

QUOTABLE . . .

"[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. "

Supreme Court Justice Tom C. Clark in School District of Abington Township v. Schempp, 374 U.S. 203, 225, 83 S. Ct. 1560 (1963). Schempp involved a state law that required the reading of the Bible at the opening of each day. The court found this to be a religious practice that violated the First Amendment.

UPDATES

Athletic Schedules and Gender Equity: Disparity Analysis and Equal Athletic Opportunity

In Michigan, there has been a long-running dispute between advocates for gender equity in the scheduling of girls' athletic contests and the Michigan High School Athletic Association.[28] The dispute is now eight years old. The end may be in sight, but that depends upon whether the U.S. Supreme Court grants certiorari or declines to review the latest decision from the 6th Circuit.

Communities for Equity (CFE) v. Michigan High School Athletic Association (MHSAA), 178 F.Supp.2d 805 (W.D. Mich. 2001) began as a class action suit in 1998 by parents and high school athletes under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, and the Equal Protection Clause of the Fourteenth Amendment.[29] Plaintiffs sought to enforce their rights under the Fourteenth Amendment through 42 U.S.C. § 1983[30] as well as a state civil rights law. The plaintiffs complained that certain girls' sports were scheduled during non-traditional and non-advantageous seasons, notably basketball, volleyball, soccer, and, in the Lower Peninsula, golf, swimming and diving, and tennis. Following an eight-day trial, the district court found against the MHSAA, noting that the MHSAA only scheduled girls' athletic contests and not boys' contests at non-advantageous or non-traditional seasons, sending a "clear message that female athletes are subordinate to their male counterparts, and that girls' sports take a backseat to boys' sports in Michigan." 178 F.Supp. 2d at 837.

As an example, the court noted that girls' basketball began on August 13 and is completed by December 1. Not only is this not the traditional season for basketball (48 states schedule girls' basketball in the winter, the same as for the boys), but it prevents Michigan girls' teams from being included in national rankings (such as the high school rankings in *USA Today*) and prevents participation in high-profile basketball camps that are often held in the fall. It also prevents Michigan girls from being considered for All-American status. Michigan girls do not participate in the "March Madness" basketball tournaments that are highly popular with the public. There are decreased opportunities for exposure to college recruiters. Four other states (North Dakota, South Dakota, Montana, and Virginia), the court observed, recently resolved this scheduling issue after being faced with litigation. The court also noted that this unusual season for girls' basketball was originally established in order to convenience the boys' basketball season, which the court found to be inequitable treatment not cured by the passing of time. Any advantages were outweighed by the disadvantages of conducting a high-profile sport during an off season. The court also noted that girls' volleyball was played in the winter whereas college women's volleyball (and 48 other States) played volleyball in the fall. Girls' soccer is scheduled for the spring rather than the fall

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[28]See **Quarterly Report**, July-September: 2004.

[29]"...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." There was also a State civil rights complaint that is not germane to this article.

[30]"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."

when it is traditionally played. Spring in Michigan, the court observed, is disadvantageous for soccer players because the "[s]occer fields in Michigan are often still frozen or snow-covered," forcing the regular season to start later. The court also found that the other sports were scheduled in such a fashion as to be disadvantageous to female athletes. Id. at 817-836. The MHSAA did offer some reasons why certain sports were scheduled when they were, such as availability of golf courses, but the court noted that no balance between boys' and girls' sports as to certain disadvantages was attempted or achieved. Id. at 851. MHSAA could not justify "forcing girls to bear all of the disadvantageous playing seasons alone to solve the logistical problems."

The MHSAA appealed to the U.S. 6th Circuit Court of Appeals. The 6th Circuit affirmed the district court under the Equal Protection Clause but did not reach the Title IX or state law claims. See Communities for Equity v. Michigan High School Athletic Association, Inc., 377 F.3d 504 (6th Cir. 2004).

The U.S. Supreme Court in United States v. Virginia, 518 U.S. 515, 116 S. Ct. 2264 (1996), in addressing the admission of women into the Virginia Military Institute (VMI), noted that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." 518 U.S. at 531.

> The State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Id. at 532-33 (internal punctuation and citations omitted). In this case, the MHSAA argued that its scheduling decisions "were designed to maximize girls' and boys' participation in athletics" through the creation of "optimal use of facilities, officials and coaches, thereby permitting more teams in a sport or more spots on a team." 377 F.3d at 512. The federal district court acknowledged the logistics of scheduling were important but that the MHSAA's reliance on "weak circumstantial" evidence was insufficient to override a finding of discrimination. Id.

The MHSAA attempted to bolster its "weak circumstantial" evidence on appeal by showing that Michigan had a higher number of female participants in high school athletics than most states, thus satisfying the VMI requirement.

> The evidence offered by MHSAA, however, does not establish that separate seasons for boys and girls–let alone scheduling that results in the girls bearing all of the burden of playing during disadvantageous seasons–maximizes opportunities for participation. MHSAA argues that bare participation statistics "*are the link* showing that separate seasons are substantially related to maximum participation." (Emphasis added.) But a large gross participation number alone does not demonstrate that discriminatory scheduling of boys' and girls' athletic seasons is substantially related to the achievement of important government objectives.

377 F.3d at 513. The 6th Circuit did "not find that MHSAA's justification for its scheduling practices is 'exceedingly persuasive' in meeting the heightened standard required by *VMI* for the

gender-based classification." Id. The federal district court's decision in favor of the plaintiffs was affirmed on the Equal Protection claim.

The MHSAA petitioned for certiorari. The United States Supreme Court issued a grant/vacate/remand ("GVR") order, vacating the 6th Circuit's decision and remanding the matter to the 6th Circuit to reconsider its decision under City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 125 S. Ct. 1453 (2005). On remand, MHSAA argued that Rancho Palos Verdes barred CFE from seeking additional remedies under § 1983 because Title IX provided the exclusive remedy for the alleged violations. CFE, for its part, argued that Rancho Palos Verdes does not apply to this case and that CFE is entitled to prevail under both Title IX and § 1983.

The Nature of a GVR Order

The Supreme Court has held that the issuance of a "GVR" Order is "an appropriate exercise of [the Supreme Court's] discretionary certiorari jurisdiction." Lawrence v. Chater, 516 U.S. 163, 116 S. Ct. 604 (1996).

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is... potentially appropriate.

516 U.S. at 167. Is the Supreme Court sending a message to the 6th Circuit that the lower court decided this matter incorrectly and that now, with the benefit of Rancho Palos Verdes, the 6th Circuit will be enlightened and decide the matter differently?

Not so, the 6th Circuit panel found, adding that a GVR order "does not indicate, nor even suggest, that the lower court's decision was erroneous." Communities for Equity v. Michigan High School Athletic Association, 459 F.3d 676, 680. The GVR order "requires us to consider the effect of *Rancho Palos Verdes* on the present case, but it does not suggest that the Supreme Court believes that [the 6th Circuit's original decision] was wrongly decided." Id.

Although § 1983 serves as a vehicle to obtain damages for violations of both the U.S. Constitution and federal statutes, Supreme Court precedent holds that where Congress has enacted a law that contains an available remedy clearly intended to serve as the method of redress for violations of the statute, such authorized remedy in the act precludes resort to § 1983. Id. at 681.

Rancho Palos Verdes is the latest of these cases to so hold. In Rancho, Abrams sued the municipal government after he was denied a permit to build a radio tower on his property. He sought injunctive relief under the Telecommunications Act (TCA), 47 U.S.C. § 327(c)(7), and damages and attorney fees under § 1983, essentially using both statutes to redress the purported violation of his rights under the TCA. Id. at 683-84. After a detailed analysis of the legislative history of the TCA, the Supreme Court concluded Congress intended the TCA remedies to be the exclusive relief available to Abrams under the TCA. He could not employ § 1983 as an additional strategy. Id. at 684.

The 6th Circuit (2-1) determined that Rancho's holding does not preclude CFE from utilizing § 1983 because Congress did not expressly intend Title IX to be the exclusive means for addressing alleged violations of this law. The court distinguished this case from the Supreme Court's line of cases, noting that CFE was not attempting to invoke § 1983 to enforce the substantive federal law in Title IX but to recover for alleged violations of the Equal Protection Clause of the Fourteenth Amendment. Id. Congress, in enacting Title IX, did not create sufficiently comprehensive remedial devices that would preclude resort to § 1983. In this case, CFE asserted violations under both Title IX *and* the Fourteenth Amendment. CFE's allegations would be actionable even if Congress had never enacted Title IX. Id.

Nevertheless, the panel reviewed Title IX under the factors used to determine whether a congressional enactment would preclude resort to § 1983:

- Are CFE's Title IX claims "virtually identical" to its constitutional claims; and
- Are the remedies provided in Title IX sufficiently comprehensive enough to indicate congressional intent to preclude reliance on § 1983.

Id. at 685. "A comprehensive discussion of both factors is not necessary so long as one factor is clearly not satisfied, which is the case here." Id. The court relied on its previous decision in Lillard v. Shelby County Board of Education, 76 F.3d 716 (6th Cir. 1996), which actually addressed the second factor, finding that Title IX contains no comprehensive enforcement scheme that would indicate Congress intended to preclude recovery under § 1983. Id. at 685-86. The panel acknowledged that the Supreme Court did find an "implied right of action for Title IX violations" in Cannon v. University of Chicago, 441 U.S. 677, 683, 99 S. Ct. 1946 (1979), but the only expressed enforcement mechanism in Title IX is the withdrawal of federal funds. There is no expressed intent of Congress to restrict remedies to the enforcement scheme in Title IX. There is no evidence Congress intended to foreclose a § 1983 action by providing an exclusive Title IX remedy. Id. at 686.[31] The 6th Circuit panel did not believe that there is any significant difference between the facts in Lillard, which involved Title IX and the Substantive Due Process Clause of the Fourteenth Amendment, and the MHSAA case, which involved Title IX and the Equal Protection Clause of the Fourteenth Amendment. "We have found no decision, either by the Supreme Court or our sister circuits, holding that Congress intended Title IX to be the exclusive remedy for one claim but not another, and we fail to understand how this could possibly be the case considering that Congress provided no express remedies at all in the statute." Id. at 687. The panel found that Rancho would not affect the 6th Circuit's previous decision in Lillard. Id. at 689. Accordingly, Lillard would be controlling precedent. Id. at 690.

The Supreme Court's finding of an implied judicial remedy in Cannon is insufficient to support a conclusion that Congress expressly intended to limit remedies to the enforcement scheme in Title IX. "The Supreme Court has never held that an implied judicial remedy is enough to preclude relief under § 1983, and the case law does not support such a conclusion in the present case." Id. at 691.

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[31]The 6th Circuit panel noted that there is an even split among the Circuit Courts on this determination, with the 8th and 10th Circuits adopting the 6th Circuit's position, see 459 F.3d at 688, while the 2nd, 3rd, and 7th Circuits believe the Supreme Court's decision that Title IX has an implied private right is sufficient to restrict remedies to Title IX and foreclose resort to § 1983. Id. at 689. The 7th Circuit case is Waid v. Merrill Area Public School, 91 F.3d 857 (7th Cir. 1996).

Equal Protection Claim

"An entity or individual charged under § 1983 with a Fourteenth Amendment violation must be a state actor." Id. (citation and internal punctuation omitted). The MHSAA's membership is primarily public schools. Its "leadership is dominated by public school teachers, administrators, and officials." Students can even satisfy high school physical education requirements through participation in MHSAA-sanctioned interscholastic sports competition. The MHSAA "is so entwined with the public schools and the state of Michigan" that there is a "close nexus between the State and the challenged action." The MHSAA is, accordingly, a state actor. Id. at 692, relying upon Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288, 121 S. Ct. 924 (2001).

As noted *supra*, under the VMI standard, a party who seeks to defend gender-based government action must demonstrate an "exceedingly persuasive" justification for that action. The MHSAA argued that its scheduling of girls' sports at disadvantageous times maximized participation by female and male athletes as well as provided optimal use of existing facilities, officials, and coaches. Id. at 692-93. This argument was found to be "without merit" by the federal district court, a conclusion upheld by the 6th Circuit. Id. at 693. There was insufficient justification for the burden of playing at disadvantageous times and seasons to fall disproportionately on female athletes.

The 6th Circuit also rejected the MHSAA's claim that it was not liable under the Equal Protection Clause because there was no evidence it acted with discriminatory intent. Id. at 694. The panel noted there is a difference between "intentional discrimination" (the intent to treat two groups differently) and "intent to harm." MHSAA is required to show that "its disparate treatment of male and female athletes serves important governmental objectives, and that the discriminatory means employed are substantially related to the achievement of those objectives. [Citation and internal punctuation omitted.] MHSAA's justifications for its actions must also be exceedingly persuasive. [Citation omitted.]" Id.

"Disparate treatment based upon facially gender-based classifications evidences an intent to treat the two groups differently." Id. In this case, the seasonal scheduling differences are based on gender and result in unequal treatment of female athletes in comparison to male athletes. This constitutes "disparate treatment." It isn't just the separation of boys' and girls' teams; it is the separation and the unequal treatment in the scheduling of seasons. Id. MHSAA "failed to satisfy its burden of justifying its discriminatory scheduling practices...." Id. at 694-95.

Violation of Title IX

MHSAA argued that CFE failed to offer proof of discriminatory animus on MHSAA's part to support a finding that MHSAA violated Title IX. The district court and the 6th Circuit panel disagreed. A Title IX violation "does not require proof that the MHSAA intended to hurt girls and chose the scheduling system as a way to do that. The Court's task is to analyze the resulting athletic opportunities for girls and boys from the different treatment that they experience by being placed in different athletic seasons, and if girls receive unequal opportunities, Title IX has been violated." Id. at 696, quoting CFE v. MHSAA, 178 F.Supp.2d at 856. Proof of discriminatory motive is not required for a Title IX claim based upon disparate treatment.

Recusal

The federal district court judge previously recused himself in a case involving the MHSAA. However, this occurred in 1983. No one–not even the judge–recalled why he recused himself from that matter. Nevertheless, MHSAA argued the judge should have recused himself from this dispute. The judge declined to do so and the 6th Circuit agreed, noting that only one of the 21 defendants in the current case was a party to the 1983 dispute, and none of the class plaintiffs was involved in the earlier matter. MHSAA did not provide any valid basis for the judge's recusal. Id. at 698-99.

The Theory of Evolution

Selman v. Cobb County School District, 390 F.Supp.2d 1286 (N.D. Ga. 2005) began when the Cobb County, Georgia, Board of Education placed a sticker in its science textbooks that reads as follows:

> This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered.[32]

Parents sued, alleging the School Board's actions violated the First Amendment's Establishment Clause.[33]

This dispute began in the Fall of 2001 when the Cobb County School District initiated the textbook adoption process specifically for science textbooks. The School had a policy since 1979 that addressed the teaching of evolution. Its last revision prior to the textbook adoption process was in 1995. The policy tried to walk the thin line between respecting the religious views of many of the School District's parents while satisfying State curricular objectives. However, the policy failed to do so by weighing too heavily in favor of those who disparage the teaching of evolution. Teachers were limited in what they could discuss, and "it was a common practice in some science classes for textbook pages containing material on evolution to be removed from the students' textbooks." 390 F.Supp.2d at 1290.

During the textbook adoption process, it became evident that textbooks under consideration would conflict with the 1995 policy. It was decided the 1995 policy should be revised so as to "strengthen evolution instruction and bring Cobb County into compliance with statewide curriculum requirements." Id. at 1290-91. Before the 1995 policy could be revised, however, science textbooks were recommended to the School Board. Parents were permitted to review the proposed textbooks. However, only three parents did so. One supported the textbooks; one expressed no opinion; the third, however, objected, asserting the textbooks should include criticisms of the theory of evolution and that alternative theories–creationism and intelligent design–should be included in any balanced instruction. A number of like-minded individuals began to express similar views to the School Board. Id. at 1291-92.

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[32]The case was reported in "Theory of Evolution" (Update), **Quarterly Report** January-March: 2005.

[33]"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The complainant identified herself as a "six-day biblical creationist."[34] Id. at 1291. The complainant became "the most vocal of the parents who complained to the School Board," organizing a petition drive that obtained the signatures of 2,300 Cobb County residents, urging the School Board to present a balanced treatment of the origins of life "and place a statement prominently at the beginning of the text that warned students that the material on evolution was not factual but rather was a theory."[35] Id. The School Board consulted with its legal counsel. From these discussions, the language quoted *supra* emerged. On March 28, 2002, the School Board unanimously adopted the recommended textbooks "with the condition that the sticker would be placed in certain of the science textbooks." Id. at 1292.

The court provided a concise summary of the various reasons and rationales from members of the School Board for their collective decision to place the sticker in the textbooks. All were in agreement that they were not actively engaged in promoting or interjecting religion. They were attempting to "promote tolerance and acceptance of diversity of opinion" and "critical thinking." Id. at 1292-94. The School Board received a mixed review: Some applauded their effort; others expressed dismay at the inclusion of the sticker. Still others–the complainant, notably–were dissatisfied with the sticker because "it did not go far enough." The complainant sought a revision to the sticker, but the School Board rejected her request. Id. at 1295-96. Between the Summer and Fall of 2002, the stickers were produced and affixed to the textbooks. Id. at 1295-96.

The School Board did not adopt a revised policy until September of 2002, nearly six months after it adopted the science textbooks and agreed on the Sticker language. The revised policy was considerably more detailed than the previous ones. It did contain one interesting passage:

> It is the intent of the Cobb County Board of Education that this policy not be interpreted to restrict the teaching of evolution, to promote or require the teaching of creationism, or to discriminate for or against a particular set of religious beliefs, religion in general, or non-religion.

Id. at 1296. Revised regulations to implement the policy were adopted in January of 2003. Notwithstanding the language in the revised policy and concomitant regulations, the sticker language continued to pose problems for teachers, especially as a result of the School Board's purported misuse of the word "theory." This gave students the impression that evolution does not exist at all or is "just" a theory, thus "diminishing the status of evolution among all other theories." Id. at 1297.

The *Lemon* Test

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[34]This is a person who believes the world was created literally in six standard days, based on the accounts in *Genesis*. Many early Christian writers indicated that the "days" in the *Genesis* account were not actually solar days, especially since the sun was not created until the fourth "day." The use of poetic and figurative language, according to theologians, is a method of revealing truth in a variety of ways. See, *e.g.*, St. Augustine's fifth century work, *De Genesi ad Litteram*.

[35]There is considerable debate over the use of "theory." For an expansive discussion of evolution, see the November 2004 issue of *National Geographic*, which has the catchy headline "Was Darwin Wrong?"

The court applied the three-prong *Lemon* test derived from Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105 (1971). Under this test, "a government-sponsored message violates the Establishment Clause of the First Amendment if: (1) it does not have a secular purpose, (2) its principal or primary effect advances or inhibits religion, or (3) it creates an excessive entanglement of the government with religion." If the government-sponsored message fails any one of these prongs, the message is unconstitutional. The court combined the second and third prongs into a single "effect" inquiry.

An initial inquiry is whether the government's purpose is to endorse or disapprove of religion. The court noted that the government's purpose need not be "exclusively secular"; rather, where there is a religious purpose present, it "must not be preeminent." The court should defer to the government's stated secular purpose "so long as the statement is sincere and not a sham." This would require the court to inspect the language of the statement itself–in this case, the Sticker language–especially within the context the language was devised, including its "contemporaneous legislative history." Id. at 1300 (citations omitted).

The court found the School Board's purpose for the sticker was sufficiently secular to satisfy this first prong of the *Lemon* test. The court relied, in part, on the revised policy, although with some reservation because the policy was adopted almost six (6) months after the sticker was devised, and "[c]ourts generally frown upon evidence of purpose that is not contemporaneous with the challenged action." Id. at 1301 (citation omitted). The revised policy stated that the purpose was to "foster critical thinking among students," "allow academic freedom," "promote tolerance and acceptance of diversity of opinion," and "ensure a posture of neutrality toward religion." Id. at 1301-02.

Although fostering critical thinking "is a clearly secular purpose for the Sticker," this goal is undermined somewhat by language in the sticker that states "evolution is a theory and not a fact" because it predetermines "that students should think of evolution as a theory when many in the scientific community would argue that evolution is factual in some respects." Id. at 1302. On the other hand, the Sticker contains no religious references or alternative theories of human origins at all, and "[t]his weighs heavily in favor of upholding the Sticker as constitutional" with respect to its purpose. Id. The court did not believe that "critical thinking" was "the Sticker's main purpose. Rather, the chief purpose of the Sticker [was] to accommodate or reduce offense to those persons who hold beliefs that might be deemed inconsistent with the scientific theory of evolution." Notwithstanding, the purpose of the Sticker is primarily secular and not a sham. Id. at 1303, 1305.

The combined inquiry of the second and third prongs (the "effect" inquiry) "asks whether the statement at issue in fact conveys a message of endorsement or disapproval of religion to an informed, reasonable observer." Id. at 31 (citations omitted). 1305. This amounts to a "judicial interpretation of social facts" through "the view of a disinterested, reasonable observer," who would be "keenly aware of the sequence of events that preceded the adoption of the Sticker." Id. at 1306. The "reasonable observer" would also know that "a significant number of Cobb County citizens had voiced opposition to the teaching of evolution for religious reasons," and that these "citizens and parents largely motivated by religion put pressure on the School Board to implement certain measures that would ...dilute the teaching of evolution, including placing a disclaimer in the front of certain textbooks that distinguished evolution as a theory, not a fact." This mythical person would also "be aware that the language of the Sticker essentially mirrors the viewpoint of these religiously motivated citizens." Id. at 1307.

> In this case, the Court believes that an informed, reasonable observer would interpret the Sticker to convey a message of endorsement of religion. That is, the Sticker sends a message to those who oppose evolution for religious reasons that they are favored members of the political community, while the Sticker sends a message to those who believe in evolution that they are political outsiders. This is particularly so in a case such as this one involving impressionable public school students who are likely to view the message on the Sticker as a union of church and state....

Id. at 1306. Although the court believed the School Board adopted the Sticker "for sincere, secular purposes," its actions could be viewed as "endorsing the viewpoint of Christian fundamentalists and creationists that evolution is a problematic theory lacking an adequate foundation." Id. at 1307. This serves to advance this particular "religious viewpoint."

The sticker statement that "Evolution is a theory, not a fact, concerning the origin of living things" is problematical for the School Board's position. The debate preceding the adoption of the sticker involved "advocates of evolution and proponents of religious theories of origin specifically concerning whether evolution should be taught as a fact or as a theory, and the School Board appears to have sided with the proponents of religious theories of origin in violation of the Establishment Clause." Id. "[I]n light of the sequence of events that led to the Sticker's adoption, the Sticker communicates to those who endorse evolution that they are political outsiders, while the Sticker communicates to the Christian fundamentalists and creationists who pushed for a disclaimer that they are political insiders." Although religion is not explicitly stated, the Sticker language suggests "that evolution is a problematic theory in the field of science" when, in fact, "evolution is the dominant *scientific* theory of origin accepted by the majority of scientists." Id. (emphasis original). "By denigrating evolution, the School Board appears to be endorsing the well-known prevailing alternative theory, creationism or variations thereof, even though the Sticker does not specifically reference any alternative theories." Id. at 1308.

The district court judge was likely aware that his opinion would be unpopular to a substantial population in Cobb County. In an further attempt to indicate how his opinion should be interpreted and applied, he wrote:

> [T]he basis for this Court's conclusion that the Sticker violates the effects' prong is not that the School Board should not have called evolution a theory or that the School Board should have called evolution a fact. Rather, the distinction of evolution as a theory rather than a fact is the distinction that religiously-motivated individuals have specifically asked school boards to make in the most recent anti-evolution movement, and that was exactly what parents in Cobb County did in this case. By adopting this specific language, even if at the direction of counsel, the Cobb County School Board appears to have sided with these religiously-motivated individuals.

Id. at 1310. The court ordered the Stickers removed from the science textbooks and permanently enjoined the dissemination of the Sticker in any form. Id. at 1313.

Appeal to the 11th Circuit

The school board appealed to the U.S. Circuit Court of Appeals for the Eleventh Circuit. The school board asked the 11th Circuit to stay the district court's injunction order requiring the

removal of the disclaimer sticker from its science textbooks. The 11th Circuit denied the motion. The school board removed the stickers. However, the 11th Circuit later vacated the federal district court's decision and remanded the case to the lower court.

In Selman v. Cobb County School District, 449 F.3d 1320 (11th Cir. 2006), a three-judge panel of the 11th Circuit found that the record from the bench trial before the federal district court judge had evidence omitted from it. These "evidentiary gaps" are compounded because some of the key findings by the district court are not supported by evidence in the record forwarded to the 11th Circuit. Id. at 1322. The matter was remanded to the district court to conduct new evidentiary proceedings and enter a new set of findings based on the evidence in the record. Id.

In one instance, the district court indicated the school board acted after receiving a letter from the "six-day biblical creationist" and a petition signed by 2,300 people. However, the record seems to indicate the letter was submitted six months after the school board made its decision and the petition arrived well after the action had been taken. Id. at 1330. In another instance, Docket Entry No. 99 was to include samples of correspondence the school board did receive. However, the entry on appeal was empty. The attorneys were unable to reconstruct the documents that should have been in the docket entry. Id. at 1330-32. Another "big problem" the 11th Circuit panel noted was the absence of the petition signed by 2,300 people. A purported copy of the petition was in the trial record, but it contained only a few hundred names. It appears the school board was not presented with a petition of any type before it made its decision. The 11th Circuit's review was also hampered by references in the trial transcript to testimony about documents which are not otherwise identified by exhibit number. It became difficult on appeal to determine which documents were being discussed. Id. at 1332-33.

The parties were unable to correct the record. It appears the district court would not be able to do so either. Although the general rule is that "absence-equals-affirmance" when the party appealing (the school board) fails to provide a complete record on appeal, the 11th Circuit did not elect to apply this rule in this case. The panel provided a list of reasons for why it was not applying the rule: the absence of evidence in the record is not solely the school board's fault ("[T]here is more than enough blame to go around."); the school board and parents have worked diligently and in good faith to supply the evidence; a meaningful review cannot be conducted without the evidence; both parties are challenging the district court's decision; and the dispute is one "of substantial public importance" which needs "to be resolved on [its] merits based on the facts instead of based upon mutual mishaps, mistakes, and misunderstandings about the evidence." Id. at 1333-34.

The 11th Circuit panel did not order the district court to conduct a new hearing as such. The court could supplement the previous testimony so as to "flesh out the evidence" that was presented during the original four-day bench trial. "Whatever the court decides to do, however, it should take care to ensure that any and all evidence on which it bases any findings is part of the record before it. The parties should ensure that the evidence put before the district court is included in the record on appeal." Id. at 1334. The 11th Circuit then provided an extensive laundry list of facts determined by the district court for which evidence was lacking or unclear. Id. at 1335-38. The 11th Circuit added that the parties should not read anything into its decision to remand the case to the district court.

> In vacating the district court's judgment and remanding the case for additional proceedings, we want to make it clear that we do not intend to make any implicit rulings on any of the legal issues that arise from the facts once they are found on

> remand. We intend no holding on any of the legal premises that may have shaped the district court's conclusions on the three *Lemon* prongs. Mindful that in this area factual context is everything, we simply choose not to attempt to decide this case based on less than a complete record on appeal or fewer than all the facts.

Id. at 1338. The parties will have to see how things evolve anew in the district court.

Date: January 5, 2007 /s/Kevin C. McDowell
Kevin C. McDowell, General Counsel
Indiana Department of Education

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